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No. 85-294

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH M. HUDSPETH,
Petitioner

v.

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and NEW NORTH MISSISSIPPI FEDERAL SAVINGS & LOAN ASSOCIATION,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER

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ARGUMENT

1. Respondents have misstated the "Question Presented."

The question presented does not concern jurisdiction over claims Petitioner might have for inappropriate and unauthorized acts by the Receiver, as suggested by Respondents. It does not concern "exhaustion of remedies." Nor does the question presented involve a claim founded on a prospective contract for consulting services. Instead, the question here concerns jurisdiction over a state law claim for performance already given, a claim belong-

ing to Petitioner and being litigated prior to the receivership's existence.[1]

The court below held that, upon the appointment of a federal receiver, such a claim becomes a claim within the sole jurisdiction of the FSLIC/FHLBB, to the exclusion of both state and federal courts. (Pet. App. 8a)

If allowed to stand, the lower court's decision will divest federal and state courts of any jurisdiction over state law claims against savings and loan associations which end up in federal receivership, even where those claims are already the subject of pending litigation.[2]

2. Respondents repeatedly compare the proceedings authorized in FSLIC/FHLBB federal receiverships to those in bankruptcy. (Resp. Br. 5, 6, 7) If the analogy is apt, then the propriety of granting FSLIC/FHLBB receiverships adjudicatory powers, to the exclusion of federal and state courts, should be judged by the same standards as apply to such a grant to bankruptcy proceedings. In that regard, this Court has held that Congress may not vest in a non-Article III court the essential attributes of the judicial power to the exclusion of the federal district court. *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). "Judicial power" has subsequently been defined to include "the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. ——, 105 S. Ct. 3325, 87 L. Ed. 2d 409, 422 (1985).

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[1] Because Petitioner's claim involves a vested credit claim for value already given, it cannot be "mooted," as Respondents describe. (Resp. Br. 7)

[2] Under the lower court's decision, even pending tort claims (e.g., a "slip-and-fall" case against a savings and loan) would be adjudicated by the receiver.

The lower court's decision is inconsistent with the standards set forth in *Marathon*. Its effect would be what this Court warned of there: the replacing of adjudication in Article III tribunals with an adjudicatory system of specialized legislative courts. 458 U.S. at 73.

3. A response to Respondents' arguments on the merits of the case is inappropriate here. However, Petitioner would note that Respondents' arguments regarding the Congressional intent underlying 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d) fail to include the legislative histories pertaining to the enactment of those statutes in their present form, to-wit:

> 1464(d)(6)(C)—S. Rep. No. 1482, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3532;
>
> 1729(d)—S. Rep. No. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054. *See also* 78 Cong. Rec. H11192 (daily ed. June 12, 1934).

Instead, only the 1968 history of the Bank Protection Act is mentioned. The only connection of that Act to either of the pertinent statutes is that it extended application of § 1464(d)(6)(C) from receiverships of federal associations to those of state-chartered associations, as well.[3] Neither the 1966 nor 1982 history supports any grant of broad adjudicatory power to the FSLIC/FHLBB.

4. The importance of the provisions of § 1730(k)(1) is not restricted to the issue of removal, as Respondents imply. § 1730(k)(1) also makes clear Congress' intent that courts, either federal or state, have jurisdiction over claims involving savings and loans in FSLIC receivership. Respondents' suggestion that § 1730(k)(1)'s effect

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[3] The lower court apparently thought § 1729(d) was enacted in 1968. (Pet. App. 6a, n.2)

is limited to 'state' receivers is simply unsupported by the language of the statute.

5. Respondents laud the efficient claims procedures of the FSLIC/FHLBB and point to the "relatively little litigation resisting FSLIC proceedings" in the past 15 years as reasons to deny review. (Resp. Br. 9, 10)

No evidence exists in the record on which to assess the quality of FSLIC claims procedures.[4] There is likewise no basis for characterizing the amount of litigation over 15 years involving FSLIC procedures. It could well be small in view of the relative health of the savings and loan industry until the last few years. Additionally, the language of 1729(d) relied upon, in part, for the claim of exclusive jurisdiction, was only implemented in 1982.

To the extent that Respondents' statements suggest, however, that the question presented here is not now the subject of extensive litigation, they are not true.

With increasing numbers of failures by banks and savings and loans associations have come increasing numbers of federal receiverships. The FSLIC/FHLBB's claim of exclusive jurisdiction to adjudicate state law claims is inevitably pressed in those proceedings, as it was here.

Thus, as Respondents well know, this question is being, and will continue to be, litigated nationwide.[5] Given the

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[4] Actually, no specific procedures in the regulations are provided for adjudication of claims such as Petitioner's claims. Compare the detailed procedures provided for making public rights claims in Part 509, 12 C.F.R. with the nonspecific language of 12 C.F.R. § 569a.8, cited by Respondents.

[5] Respondents cite five 1985 district court decisions on the same question presented here. (Resp. Br. 4, n.3) Petitioner is aware of other actions pending, where it is an issue, including: *American Fed. Savings & Loan Assoc., et al. v. Westside Fed. Savings & Loan Assoc., et al.*, No. C85-323C (W.D. Wash.); *First American Savings Bank, et al. v. Westside Fed. Savings & Loan Assoc., et al.*, No.

certainty of continued and widespread litigation on the question presented here, review and establishment of a uniform rule by this Court now would benefit everyone concerned.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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C85-1087C (W.D. Wash.); and *Rembold v. Gibraltar Savings & Loan Assoc., et al.*, No. C84-1644V (W.D. Wash.).